VIRGINIA LAW REGISTER.

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AT its recent meeting at the Hot Springs, the Virginia State Bar Association appointed a committee to investigate the "Torrens System" for the transfer of real estate and the registration thereof.

We cordially approve of this movement. We are not sufficiently advised as to whether the system as adopted in Illinois is working as successfully as its advocates anticipated, but as it appears on paper the plan is most excellent and economical; and as far as may be gathered from references to the system in the Illinois press, lay and legal, it works well in practice.

Some account of the working of the system was published in the June number of the current volume (p. 123.) We shall await the report of the committee with interest.

THE movement set on foot by the Illinois Bar Association, on the motion of Adolph Moses, Esq., the accomplished editor of the *National Corporation Reporter*, for the celebration of "John Marshall Day," February 4, 1901, in commemoration of the one hundredth anniversary of Chief Justice Marshall's ascension to the bench of the Supreme Court of the United States, has met with an enthusiastic reception from the bar throughout the country.

We publish in full elsewhere the proposition of the Illinois Bar Association, together with the resolution of the Virginia State Bar Association, endorsing the movement, and engaging the cordial co-operation of the Virginia bar in furtherance of the happy idea.

It is peculiarly fitting that the Virginia bar should heartily unite in this movement, for it was this bar that gave the great Chief Justice to the country. We feel sure that our brethren from beyond the State lines will not begrudge us the feeling, that while his fame belongs to the whole nation, we of the profession in Virginia may claim

something more than our ratable proportion of the glory which he has reflected upon the American bar.

The VIRGINIA LAW REGISTER pledges active support to the movement, and hopes to see "John Marshall Day" celebrated in every hamlet and household—and celebrated in such fashion that the most ignorant citizen may be led to inquire and to learn what manner of man this John Marshall was.

THE West Virginia Supreme Court has recently shocked the profession of that State by deciding that the maxim *nullum tempus occurrit regi* will prevent private individuals from acquiring rights by adverse possession of roads, streets and other property dedicated to public use. *Ralston* v. *Town of Weston*, 33 S. E. 236. The decision is clearly sound, but the circumstance that the contrary doctrine had been firmly established by a long line of decisions in that State, and had become a rule of property, affecting vested rights, has called down upon the court criticism as severe as it is just. A large part of the current number of the *West Virginia Bar* is devoted to the decision, and contributors and editors do not mince matters in discussing the situation in which the court has placed itself, and the worse situation in which it has placed those who have purchased property in reliance upon the former decisions. Nor are these animadversions confined to the action of the court in this particular case. It is charged, if not in express language, by plainest implication, that the judges have in numerous instances shown themselves incompetent for the high places to which they have been elevated. Many public criticisms of the court from outside sources are published, amongst them an extract from Hale on Damages, in which the author, after reviewing the West Virginia authorities, adds: "These cases have been recently overruled in an elaborate opinion, which relies principally upon scriptural authority."

"We want in all kindness and respect to the court," says a writer in the journal referred to, "to say to it that by its constant disregard of the precedent it is undermining and destroying the confidence of the bar in this State, and also the confidence that the people should have in our court of last resort, which holds in its hands their lives, liberty and property."

We have heretofore referred to some of the unjudicial utterances of the West Virginia court. A friend has recently called our attention to the opinion in *Ward* v. *Ward*, 26 S. E. 542, with the remark that an extract from it would serve to amuse the readers of the REGISTER

during the dog days. But for lack of space we should adopt the suggestion. Our readers may turn to it and read it for themseves. It scarcely equals, however, the opinion in *Atkinson* v. *Plumb*, 32 S. E. 229.

THE decision of the Virginia Court of Appeals in *American Net, etc. Co.* v. *Mayo*, 33 S. E. 523, that in a bill to set aside a fraudulent conveyance there need be no allegation of notice of the intended fraud on the part of the grantee, is an important one.

The ruling is contrary to the generally received practice, and we cannot but believe that it relaxes the already loose pleading in our chancery courts, beyond what a wise policy would warrant.

Section 2458 in express terms provides that "this section shall not affect the title of a purchaser for valuable consideration, unless *it appear* that he *had notice* of the fraudulent intent of his immediate grantor." There are, therefore, two essential elements to entitle the plaintiff to relief: (1) A fraudulent intent by the grantor, and (2) Knowledge of that intent by the grantee. And the burden of proof is on the plaintiff to establish both—the notice as well as the fraudulent intent. The statute itself, by the language "unless it appear," expressly so declares. See also *Hickman* v. *Trout*, 83 Va. 478; *Hazlewood* v. *Forrer*, 94 Va. 703. If notice is made by the statute an essential part of the proof, every principle of pleading would require that it be distinctly alleged.

The court seems to regard the allegation that the conveyance was without consideration, as well as fraudulent, amounted to an allegation of notice. But this confuses the statute of "voluntary" conveyances with that of "fraudulent" conveyances. The two statutes are wholly distinct. (Secs. 2458, 2459.) A voluntary conveyance is voidable as to existing creditors, but is not necessarily fraudulent. A charge that a conveyance is voluntary, is not a charge that it is fraudulent—and *a fortiori* does not amount to the double charge that it is fraudulent and that the grantee knew it.

However, unless the court shall in some future case recede from this ruling, it must be taken as the settled rule of practice in Virginia, that an allegation that a conveyance is "voluntary and fraudulent," sufficiently charges the grantee with notice of the intended fraud.

WE published some months ago, a communication from F. B. Kennedy, Esq., of the Staunton bar (4 Va. Law Reg. 790), on the subject of judgments as liens on lapsed devises. The question discussed

was, whether a devise to one who dies in the lifetime of the testator, passing, under the Virginia statute, to the devisee's issue, is subject to the debts of the deceased devisee, or whether it passes directly to the issue, as purchasers from the testator.

Since the publication of Mr. Kennedy's communication, the question has been before the Court of Chancery of New Jersey, under a statute somewhat similar to, though not identical with, the Virginia statute.

The New Jersey statute is in the following language:

"Whenever any estate of any kind shall or may be devised or bequeathed . . . . to any person being a child or other descendant of such testator or testatrix, ... and such devisee or legatee shall, during the life of such testator or testatrix, die, testate or intestate, leaving a child or children, or one or more descendants of a child or children, who shall survive such testator or testatrix, in that case such devise or legacy to such person so situated as above mentioned . . . . shall not lapse, but the estate so devised or bequeathed *shall vest in s ch child or children*, descendant or descendants of such legatee or devisee, *in the same manner as if such legatee or devisee had survived the testator or testatrix, and had died intestate.*"—P. L. 1887 (3 Gen. St. p. 3763, sec. 34).

The court interprets this statute as substituting the children of the deceased devisee or legatee in the place of the parent, and vesting title in them, not through their parent, but directly from the testator; and hence concludes that the legacy or devise is not subject to the debts of the deceased parent. *Suydam* v. *Voorhees* (N. J.), 43 Atl. 4.

A different construction has been placed on the English statute concerning lapsed devises (1 Vict., ch. 26, sec. 33): *Johnson* v. *Johnson*, 3 Hare, 157; *In re Parker*, 1 Swab. & T. 523; *In re Mason's Will*, 34 Beav. 494; *Eager* v. *Furnival*, 17 Ch. Div. 115; but the language of the English statute materially differs from both the Virginia and the New Jersey statutes. It reads as follows:

"When the devisee or legatee shall die in the lifetime of the testator, leaving issue, and such issue of his person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall *take effect as if the death of such person had happened immediately after the death of the testator.*"

This language, and particularly the last clause, which we have italicized for sake of emphasis, clearly imports that the surviving issue shall take through the parent, and not directly from the testator. The New Jersey statute is distinguished, in the case mentioned, by reason of the clause, not found in the English statute, that the legacy or devise "shall vest in such child or children." The court says:

"The language of the sections relative to lapses in the English act

radically differs from the text in our act. The former provides that 'when the devisee or legatee shall die in the lifetime of the testator, leaving issue, and any such issue of his person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator.' By the express terms of the English act, it is perceived, the life of the devisee is to be regarded as prolonged until the devise or bequest can vest. The devise or legacy shall take effect 'as if the death of the devisee or legatee had happened after the death of the testator.' The statute says no more. Of course, therefore, if the death of the former had not occurred until after the death of the latter, the devise or legacy would have vested in the former. And as the statute stops with the provision that the life of the former shall be, for purposes of construction, prolonged until after the death of the testator, the vesting in him must be presumed to occur. There is no express provision in the English act for vesting at all, and so the construction given to the act was the only possible one. 'The act,' says Mr. Jarman, 'does not substitute the surviving issue for the original devisee or legatee, but makes the gift of the latter take effect notwithstanding, in the testator's lifetime, in the same manner as if his death had happened immediately after that of the testator. The subject of the gift, therefore, will, to all intents and purposes, constitute the disposable property of the deceased donee, and as such will either devolve upon his representatives, or follow the disposition of his will.' The fact of the death of the legatee before the death of the testator is in our act quite different. Its provision is that the legacy shall not lapse, but shall vest in such child or descendant in the same manner as if such legatee had survived the testator, and had died intestate. The concluding words are employed merely to fix the manner in which the legacy shall vest in the statutory substitute. The legatee is not to take as if he had survived the testator, nor does the statute create merely a legal presumption that the legatee survived the testator, without more, as in the English act; but the sole provision in our act is that the legacy shall vest in the child or descendant, as if the legatee had survived the testator.

. . . . . .

"The latter [the children or descendants] take what the testamentary legatee would have taken. It does not mean that the deceased legatee takes an interest in the legacy which passes through

him to his child, and which, in passing, is liable to be seized upon by the creditors or the personal representative of the father. Such a meaning would be contrary to the words of the act. Under the statute, there is no vesting in the father for an instant. The legacy which would have vested in the father, had he lived, is by the statute vested in the first instance in the son. In respect to it, there is nothing for the personal ropresentatives of the father to administer, nor for his creditors to reach."

The New York statute is in almost identical terms with that of New Jersey, and the construction of the New Jersey court coincides with that prevailing in New York. *Cook* v. *Munn*, 12 Abb. (N. C.) 344; 65 How. Pr. 514.

Similar statutes exist in many of the States, and we find the following cases cited as sustaining the doctrine of the New Jersey and New York courts. We have not examined these cases, however, and are unable to say how far they are pertinent in construing the Virginia statute: *Glenn* v. *Belt*, 7 Gill & J. 362; *Wallace* v. *Du Bois*, 65 Md. 153; *Jones* v. *Jones*, 37 Ala. 646; *Maxwell* v. *Featherstone*, 83 Ind. 339; *Barrett's Appeal*, 104 Pa. St. 342; *Gordon* v. *Pendleton*, 84 N. C. 98; *Smith* v. *Smith*, 5 Jones Eq. (N. C.) 305; *Carson* v. *Carson*, 1 Met. (Ky.) 300.

It is a noteworthy circumstance that the original statute in Virginia on this subject, approved January, 1813, expressly provided that the devise or legacy should pass

"to the heirs, devisees, distributees, etc., of such devisee or legatee, in like manner, to all intents and purposes, in law and in equity, *and subject to like debts, charges, liabilities and conditions* in all respects, as *if such devisee or legatee had survived the testator* and had then died intestate."

This was altered by the Code of 1819 (ch. 104, sec. 5) to precisely the present form of the New Jersey statute already quoted, with one or two immaterial verbal differences. A comparison of the two makes it evident that one was copied from the other, or both were taken from the same source. The revisors of the Code of 1849 reported the statute in the following form:

"Where any real or personal estate is devised or bequeathed to a person who is a child or other issue of the testator, for any estate or interest not determinable at or before the death of such person, if such person die in the lifetime of the testator, leaving issue, any of which is living at the testator's death, such devise or bequest shall not lapse, but shall take effect as if the devisee or legatee had died unmarried and intestate, immediately after the testator, unless a contrary intention shall appear by the will." Report of Revisors, p. 626, sec. 12.

The Joint Committee of Revision, however, did not accept it in this form, and remodelled it into the form in which it now appears in the Code of 1887. See Report of Joint Committee of Revision, p. 144; Code of 1849, ch. 122, sec. 13.

It is perfectly clear that under the act of January, 1813 (Acts, 1812, ch. 19), referred to, the devise or legacy did not pass directly to the issue of the deceased legatee or devisee, but was regarded as a part of the estate of the latter, and was subject, in express terms, to his debts.

Nor is it at all clear that the altered form of the statute under the revisal of 1819 changed this result, under the established rule of construction that in the general revisal of Codes the old law is not intended to be altered unless such intention plainly appears in the new Code. Here the old law declared that the gift should pass to the issue, "in like manner, to all intents and purposes, at law and in equity, and subject to like debts, charges, liabilities and conditions, in all respects, as if such devisee or legatee had survived the testator and had then died intestate." The new law declared that the gift should vest in the descendants of the deceased legatee or devisee "in the same manner as if such legatee or devisee had survived the testator or testatrix, and had died unmarried and intestate." Reading the latter in the light of the former, the intention seems to have been to curtail the verbiage without altering the meaning. The omission of the specific declaration that the gift should pass, subject to the debts of the deceased legatee or devisee, does not necessarily indicate an intention that the gift shall not so pass. The provision that it shall pass to the issue "in the same manner as if such legatee or devisee had survived the testator or testatrix, and had died unmarried and intestate," implies that it shall be subject to the debts of the original beneficiary. For certainly if he had actually "survived the testator and died unmarried and intestate" the property would have been subject to his debts.

If, then, no change in the substance of the original act was wrought by the Code of 1819, what was the effect of the alteration of its language when carried into the Code of 1849?

Clearly, the first draught reported by the Revisors (quoted in full above), made no other than slight verbal alterations, with the purpose of omitting some of its redundant verbiage. The express provision that the gift should vest in the issue was omitted, and it was simply declared that the devise or bequest should not lapse, in the case men-

tioned, but "shall take effect as if the devisee or legatee had died unmarried and intestate, immediately after the testator"—importing that the issue should take through the original beneficiary, and not directly from the testator; and, of course, subject to the debts of the deceased legatee or devisee through whom the issue claimed.

With this review of the previous history of the statute, the fixed policy of which up to this time was that the legacy or devise should pass to the issue subject to the debts of the original beneficiary, through whom the issue claimed—a policy the continuance of which the revisors of the Code of 1849 recommended in their reported draught—we are brought to the construction of the language into which legislative intention finally found expression in the Code of 1849, viz:

"If a devisee or legatee die before the testator, leaving issue who survive the testator, *such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done, if he had survived the testator,* unless a different disposition thereof be made or required by the will." Code of 1849, ch. 122, sec. 13; Code of 1887, sec. 2523.

One radical change here made is, that instead of confining the operation of the statute to the case where the deceased legatee or devisee is a child or descendant of the testator, its scope is extended so as to include every case of beneficiary under a will, dying before the testator and leaving issue.

It will be noted also that there is a marked alteration of the terms in which provision for the issue is made. They are not to take "in the same manner as if such legatee or devisee had survived the testator and died unmarried and intestate," as under the Code of 1819—nor is the gift to take effect "as if the devisee or legatee had died unmarried and intestate immediately after the testator," as the revisors of the Code of 1849 recommended—but "such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator." (Code of 1887, sec. 2523.) In other words, as it seems to us, the issue shall take as substituted legatees or devisees, in place of the deceased ancestor, just as if their names had been inserted in the will by the testator himself. By force of the statute, the issue are substituted as statutory legatees or devisees, in the place of their ancestor.

A provision in a will for A, with direction that if he do not survive the testator, B shall take the legacy "as A would have done if he had survived the testator," would not indicate that B should claim in

in any manner through A, or that the legacy in B's hands should be subject to A's debts. So, here, the will and the statute are to be read together. The will, let us suppose, gives a legacy to A, who dies before the testator. Reading the will and the statute together, we may legitimately read the will as if it had in terms provided that "if A die before me (the testator), leaving issue who shall survive me, such issue shall take the legacy as A would have done, had he survived." Certainly, this could not be construed as carrying the legacy to the issue through A, and, therefore, subject to his debts. It is plainly a substitution of the issue in the place of A, whose interest failed by reason of his death.

Nor is it likely that the Joint Committee of Revision, familiar as its members were with the previous legislation on this subject, would have omitted the plain intimations of former statutes that the issue in such cases should claim through the deceased legatee or devisee, and not directly from the testator, save with the intention of altering the law in this particular.

We have little difficulty in concluding that under the present statute in Virginia the issue take directly from the testator, as statutory substitutes for their ancestor, and consequently free from his debts or liabilities.